NORMAN DISNEY & YOUNG A

v.

AFFIFI HJ HASSAN

HIGH COURT MALAYA, KUALA LUMPUR B
LEE SWEE SENG JC
[CIVIL SUIT NO: S-22-669-2009]
9 JUNE 2010

CIVIL PROCEDURE: *Striking out - Action - Plaintiff's action against defendant based on contracts with unlawful objects and/or consideration - Defendant applying to strike out action - Pointless for plaintiff to go to trial* C

CONTRACT: *Void contract - Consideration unlawful - Contract attempting to circumvent requirements of statute - Such contract void under s. 24(a) and (b) of Contracts Act 1950 - Impossible to sever unlawful part of contract from lawful part - Such severability prohibited under s. 25 of Contracts Act 1950 - Contracts Act 1950, ss. 24, 25* D

CONTRACT: *Illegality - Contravention of law - Contract attempting to circumvent requirements of statute - Such contract unlawful - Approach of court when illegality suspected* E

CONTRACT: *Illegality - Public policy - 'Ali Baba' type of companies - Contracts to establish such companies illegal and contrary to public policy*

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The plaintiff was an Australian firm of consulting engineers. The firm of NDYSB was incorporated in Malaysia under the Companies Act 1965 in 1987. In 1994, NDYSB was restructured with a view to enhance the company's ability to secure specific contracts. The defendant and another person were brought in and made directors of NDYSB. Several agreements were then executed with the defendant as party with the result that 65,000 shares were transferred to the defendant. Two of those agreements were Call Option agreements wherein the defendant granted the plaintiff options to purchase the 65,000 shares on the triggering of specific call events. It was the plaintiff's case that the shares were to be held on behalf of the Australian investors with only a small percentage held by the locals. The defendant however contended that the restructuring of NDYSB was with a view to establish a Bumiputera company, with Bumiputeras as majority shareholders and decision-makers. The defendant denied that he held the shares as a proxy of the

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A defendant. Disputes arose between the plaintiff and the defendant and the call events were triggered. The plaintiff sought to exercise its call options but the defendant refused to comply. The plaintiff thus filed the instant action, praying *inter alia* for: (i) a declaration that it was the beneficial owner of the 65,000 shares; (ii) specific B performance of the Call Option agreements; and (iii) an order restraining the defendant from dealing with the shares. The defendant applied to strike out the plaintiff's action under O. 18 r. 19 of the RHC 1980. The defendant contended that the arrangement where the local shareholders were holding shares as C proxies for the plaintiff contravened s. 7A(3) and s. 10(4) of the Registration of Engineers Act 1967.

Held (allowing the defendant's application without costs):

D **(1)** Any attempt to circumvent the requirements under the Registration of Engineers Act 1967 would run foul of s. 24(a) and (b) of the Contracts Act 1950. The existence of a severability clause in the agreements would not help the plaintiff. To allow the severability clause would be scandalous and would only entitle the plaintiff to the best of both worlds. E Detaching the unlawful and the illegal from that which is not, is prohibited by s. 25 of the Contracts Act 1950. (paras 27-29 & 40-41)

(2) To allow the plaintiff to pursue its claim would be to allow the F plaintiff to defeat the intention of Parliament that for the practice of consulting engineers, the shares in the body corporate so formed for that purpose must be held by professional engineers who are either citizens or permanent residents. (para 30)

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(3) The attitude of the court has been that anything that smacks or smells of illegality or any set of facts that seems to support such a suggestion will be seriously scrutinised by the court. No court would knowingly be a party to the enforcement of an H unlawful agreement. *Thong Foo Ching & Ors v. Shigenori Ono* (foll). (para 31)

(4) The plaintiff's true intention was to create an 'Ali Baba' type of company where control of the company was still vested in I the hands of the foreigners. The establishment of 'Ali Baba' companies is illegal as it is against Malaysian public policy. If

the proxy shares arrangement had been made known to the Board of Engineers at the material time, the plaintiff would not have been able to establish a consulting engineering company in Malaysia. *Bakar Ahmad v. Subramaniam Kanniah* (refd); *Tan Bing Hock v. Abu Samah* (refd); *Baldev Singh v. Mahima Singh & Ors* (refd); *Suntoso Jacob v. Kong Miao Ming & Anor* (refd); *Fusing Construction Sdn Bhd v. Eon Finance Bhd & Ors and Another Appeal* (refd). (para 33-35)

(5) The plaintiff's argument that its action to enforce the Call Option agreements was nothing more than an ordinary commercial matter devoid of any illegality could not be accepted. The words used in the statement of claim and the relief prayed for were suggestive of a trust relationship between the parties, contrary to s. 10(4) of the Registration of Engineers Act 1967. (para 35)

(6) There was no purpose in allowing the plaintiff's action to go to trial since at every corner the plaintiff would be confronted with the charge of illegality. However in the instant case, the defendant was himself a willing party to the illegal transactions. He should not be allowed to profit from any costs that might normally be granted in the defendant's favour. (para 42s-44)

Case(s) referred to:

Bakar Ahmad v. Subramaniam Kanniah [1992] 4 CLJ 1833; [1992] 2 CLJ (Rep) 154 HC ***(refd)***

Baldev Singh v. Mahima Singh & Ors [1974] 1 LNS 13 ***(refd)***

David Hey v. New Kok Ann Realty Sdn Bhd [1984] 1 LNS 51 FC

Fusing Construction Sdn Bhd v. Eon Finance Bhd & Ors and Another Appeal [2000] 3 CLJ 341 CA ***(refd)***

Kang Kok Kwang v. Bukit Baru Centre Sdn Bhd & Ors [1991] 1 CLJ 343; [1991] 2 CLJ (Rep) 789

Kondapuram Raghuram v. Soo Peng & Ors [2006] 7 MLJ 510

Suntoso Jacob v. Kong Miao Ming & Anor [1984] 1 LNS 32 HC ***(refd)***

Tan Bing Hock v. Abu Samah [1967] 1 LNS 176 ***(refd)***

Thong Foo Ching & Ors v. Shigenori Ono [1998] 4 CLJ 674 CA ***(foll)***

Legislation referred to:

Contracts Act 1950, ss. 24(a), (b), (e), 25

Registration of Engineers Act 1967, ss. 7A(3), 10(4)

Rules of the High Court 1980, O. 18 r. 19(1)(a), (b), (c), (d)

A *For the defendant - Lim Kian Leong (Rachel Tan Pak Theen with him); M/s Lim Kian Leong & Co*
For the plaintiff - Conrad Young (R Jayasingam & S Ravindran with him); M/s BH Lawrence & Co

B *Reported by Andrew Christopher Simon*

JUDGMENT

C **Lee Swee Seng JC:**

Prologue

[1] Businessmen and professionals enter into a myriad of agreements in their business and professional relationships, arrangements and dealings. Some appear innocuous on the surface, perhaps deliberately couched and clothed or so carefully crafted so as to cast an appearance of compliance and correctness with the law. Once there are differences leading to disputes, parties may contend that what appears conducive and convenient for the parties at the commencement of the contract is now contaminated with illegality and condemned for being null and void and unenforceable.

[2] Such is the scenario that has come before the court for determination.

F **Parties**

[3] The plaintiff is a firm practising as consulting engineers in Australia. The defendant is a registered engineer and a Malaysian citizen. He is the duly registered shareholder of 65,000 shares in Norman Disney & Young Sdn Bhd (NDYSB). NDYSB is a company incorporated in Malaysia under the Companies Act 1965. The plaintiff had given a revocable non-exclusive right to the defendant to use the trade name of Norman Disney & Young.

[4] NDYSB was incorporated on 17 November 1987 with a paid-up capital of RM2. The first directors and shareholders of the company for the purposes of the arrangement that the parties had entered into were Liew Yan Sin and Hugh David Norman. Sometime in 1994, one Albert Tuba, who was the Manager for Business Development of the Australian investing partners wanted to restructure the company with local directors. The overt and obvious

purpose was to "enhance the company's ability to secure specific contracts", to use the very words employed by the plaintiff. See para. 5 of the plaintiff's statement of claim. It was decided that local partners be brought in and be made majority shareholders and so the plaintiff invited one Mohd Zawawi Mahmud and the defendant to join the company.

[5] The shares proposed to be distributed were shares to be held **on behalf of the Australian investors** with a very small percentage to be held by the local partners. (emphasis added) The proposed share distribution was as follows:

		Local Proxy shares owned by plaintiff
(a) Mohd Zawawi Mahmud	15%	35%
(b) The defendant	5%	20%
(c) Foo Jong Wee	5%	20%

[6] The defendant and Foo Jong Wee were made directors of NDYSB. The defendant was brought in to assist in the building up of NDYSB by helping to secure specific projects because of his status as a local partner. See para. 8 of the plaintiffs statement of claim. Later when Mohd Zawawi Mahmud resigned, the defendant became the majority shareholder.

[7] The defendant gave a consistent narration of the genesis of the restructuring of NDYSB that started in 1991. The defendant was candid in stating that the object of the restructuring was to 'localise' NDYSB to comply with Malaysian Law and conditions by establishing a bumiputra status company with both its control and majority shareholdings vested in the hands of bumiputras. The restructuring, according to the defendant, would have the following features as its end result:

i. NDYSB was to be locally established with Bumiputra status;

ii. Bumiputras were to have 75% of the total shareholdings in NDYSB;

iii. The decision making of NDYSB was to be controlled by Bumiputeras;

A iv. There were to be two (2) Bumiputeras directors collectively holding 75% of the total shareholdings of the company and one (1) Malaysian Chinese director to represent the Malaysian Chinese staff; and

B v. The Malaysian Chinese director was to have 25% shareholdings of NDYSB.

[8] The defendant avers that he only agreed to join NDYSB based on the above conditions.

C **Plans**

[9] A myriad of agreements were entered into to which the defendant was a party in relation to the shares in NDYSB-all in totalling 9 and all dated 28 September 1991.

D i. A sale and purchase agreement (1st sale and purchase agreement) between Liew Yan Sin ("LYS") and the defendant for the sale of 60,000 ordinary shares ("60,000") held by LYS to the defendant at a total purchase price of RM748,800 (1st purchase price) which, upon completion of the sale and purchase agreement, constituted a debt owing by the defendant to LYS and secured by a charge over the 60,000 shares;

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ii. A loan agreement (1st loan agreement) between the defendant and LYS in relation to the 1st purchase price wherein the defendant granted the plaintiff an option to purchase the 60,000 shares upon the terms of a call option agreement;

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iii. A call option agreement ("1st Call Option Agreement") between the defendant and the plaintiff wherein the defendant granted the plaintiff an option to purchase the 60,000 shares (including rights and bonus shares) exercisable upon the occurrence of an event of default as defined in the 1st loan agreement;

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H iv. A deed of novation executed by LYS, the defendant and NDYF whereby LYS assigned all his rights under the 1st loan agreement to Norman Disney & Young Finance Pty. Ltd. ("NDYF");

I v. A power of attorney ("1st Power of Attorney") given by the defendant appointing NDYF as the defendant's true and lawful attorneys in relation to the 60,000 shares;

vi. A sale and purchase agreement ("2nd Sale and Purchase Agreement") between Liew Yan Sin ("LYS"), NDYF and the defendant for the sale of 5,000 ordinary shares ("5,000 shares") held by LYS to the defendant at a total purchase price of RM62,400 ("the 2nd Purchase Price") which, upon completion of the sale and purchase agreement, constituted a debt owing by the defendant to NDYF and secured by a charge over the 5,000 shares;

vii. A loan agreement ("2nd Loan Agreement") between the defendant and NDYF in relation to the 2nd purchase price wherein the defendant granted the plaintiff, a Call Option ("2nd Call Option") to purchase the 5,000 shares upon the terms of a call option agreement;

viii. A call and put agreement ("2nd Call Option Agreement") between the defendant and the plaintiff wherein the defendant granted the plaintiff an option to purchase the 5,000 shares (including rights and bonus shares) exercisable upon the occurrence of a call event or put event as defined in the call and put option agreement;

ix. A power of attorney given by the defendant appointing NDYF as the defendant's true and lawful attorneys in relation to the 5,000 shares.

[10] It is the plaintiff's pleaded case that the 60,000 shares and the 5,000 shares were transferred to the defendant after the nine agreements were executed. Plaintiff further asserted that the defendant has failed to make any payment for the said shares.

[11] It was further pleaded that the plaintiff consented to the sale and purchase of the 60,000 shares and the 5,000 shares and the continued use of its trade name strictly subject to the terms and conditions contained in the various agreements and particularly to the several covenants, warranties and undertakings given by the defendant together with the undertaking of NDYSB to abide by and execute the terms and conditions of the several agreements in the event of default by the defendant.

[12] The plaintiff states that it is entitled under the Call Option Agreements to demand, at any time, that the shares be transferred to the plaintiff in the event of default by the defendant of any of

A the terms, conditions, covenants, warranties and undertaking stipulated in the 1st loan agreement and the 2nd Call Option Agreement.

[13] The defendant however denies that he was holding 20% shares
B as proxy on behalf of the plaintiff. The defendant said that he had never agreed to be a proxy. The defendant said he was invited to take up shares in the company based on his own capability, experience and profile in the industry and not merely as a nominee to the plaintiff.

C **[14]** The defendant contends that the directors and shareholders had since 1997 considered their shares to have been paid in full with the payment of RM1.2 million paid between August 1995 to June 1996 to the plaintiff as full and final settlement of the
D NDYSB's shares. The RM1.2 million was derived from the profit made by NDYSB in 1993.

Problems

[15] Where expectations are not met, there will be disappointments.
E The plaintiff tells the story that from the start the defendant had been disruptive and did not co-operate with the other directors.

[16] It appears that the relationship has been stormy and finally the breakpoint came following the vacation of office of the defendant
F as s director of NDYSB on 24 December 1999 due to his absence from Board meetings. The defendant attempted to have himself reinstated as a Director but failed to obtain the appropriate approval in the general meeting. The defendant lodged a complaint with the Companies Commission of Malaysia on 13 May 2008.

G **[17]** In what was perceived by the plaintiff as a further attempt to apply pressure on NDYSB and in breach of the several terms and conditions of the above mentioned agreements and in default of the covenants and undertakings contained therein, the defendant, without any authorization or knowledge of the plaintiff, presented a
H winding-up petition against NDYSB on April Fool's Day 1 April 2009. This the plaintiff contends, triggered an event of default under the 1st Loan Agreement. The defendant further created a call event under the 2nd Call Option Agreement by the presentation of the winding-up petition.

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[18] The plaintiff saw the presentation of a winding-up petition as an act of bad faith by the defendant to prevent the transfer of the 60,000 shares and the 5,000 shares to the plaintiff by NDYSB and to coerce and/or apply undue pressure on NDYSB and its officers to elicit a settlement.

[19] Things came to a hilt when the plaintiff, as a result of the several alleged breaches by the defendant, exercised its rights under the 1st Call Option Agreement and the 2nd Call Agreement and issued call notices dated 29 July 2009 to purchase the 60,000 shares and the 5,000 shares. The defendant failed to comply with the call notices within the period stipulated in the agreements.

Prayers

[20] Plaintiff seeks to enforce what on the surface and within the four walls of the agreements, appears to be a commercial agreement for which there has been a breach by the defendant. There were two Call Option Agreements entered into between the plaintiff and the Defendant, by which the defendant is obliged to sell to the plaintiff the 65,000 shares registered in the defendant's name with NDYSB. It is the plaintiff's pleaded case that the defendant had borrowed RM811,200 from the plaintiff to purchase the 65,000 shares in NDYSB and was to repay the plaintiff.

The defendant refused to transfer the shares over to the plaintiff and hence this suit.

[21] The plaintiff had prayed *inter alia* for the following and in a summarized form they are as follows:

i. A declaratory order that the plaintiff is the beneficial owners of the 60,000 shares and the 5,000 shares (the said shares) in NDYSB currently registered in the name of the defendant and are entitled to the transfer of the shares from the defendant;

ii. Specific Performance of the 1st Call Option Agreement and the 2nd Call Option Agreement;

iii. An order that the defendant be restrained from selling, transferring, assigning, charging or howsoever dealing with or disposing of the said shares acquired by the defendant to any third party;

A iv. An order restraining the defendant from proceeding with or taking any further steps in the winding-up proceedings presented in the Kuala Lumpur High Court *vide* Petition No. D-28-216-2009;

B v. Damages;

vi. Interest;

vii. Costs.

C **Principles**

[22] If the plaintiff's claims are obviously unsustainable then the defendant may justifiably apply to strike out the claims. In other words it must be something patently plain and openly obvious that the plaintiff's claim has to be struck out.

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[23] The defendant is proceeding either under O. 18 r. 19(1)(a) or (b) or (c) or (d) of the Rules of High Court (RHC).

[24] Taking the plaintiff's very own pleading and in particular para. E 6 of the statement of claim it is pleaded that the local shareholders are holding shares as proxies for the plaintiff. That being the case the defendant contends that this arrangement where the registered shareholders are Malaysian citizens or permanent residents holding shares on behalf of the plaintiff being a foreigner fall foul of and is F in clear contravention of and indeed covertly circumventing the provisions of s. 7A(3) and s. 10(4) of the Registration of Engineers Act 1967.

[25] Section 7A(3) of the Registration of Engineers Act 1967 states G that the approval for a body corporate to practise as consulting engineers in Malaysia may only be granted if the body corporate comprises a board of directors who must be professional engineers and have shares held by the members of the board or other persons who are professional engineers.

H **[26]** Section 10(4) of the Registration of Engineers Act 1967 provides that only a citizen or a permanent resident of Malaysia would qualify for registration as professional engineers.

[27] Any attempt to circumvent the requirements under the I Registration of Engineers Act 1967 would run foul of s. 24(a) and (b) of the Contracts Act 1950 which reads:

[28] The consideration or object of an agreement is lawful, unless: **A**

(a) It is forbidden by a law;

(b) It is of such a nature that, if permitted, it would defeat any law;

– **B**

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In each of the above cases, the consideration or object of an **C** agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.

[29] Nothing could be clearer. It is said that a lawyer's task is to steer the client clear from any infraction of the law. However, when **D** the prohibition is clear to dress up the agreements as something docile can only be dismissed as a design to distract and deceive the regulators.

[30] Defendant contends that if the action is not struck out, **E** NDYSB would continue to carry on a business in blatant and perhaps even in a brazen and bold disregard of the Registration of Engineers Act 1967. More than that it would be tantamount to giving approval to a continuing breach or contravention of the Registration of Engineers Act 1967 by NDYSB and the plaintiff. I **F** find merits in this argument. To allow the plaintiff to pursue their claims would be to allow them to defeat the intention of Parliament that for the practice of consulting engineers the shares in the body corporate so formed for this purpose must be held by professional engineers who must be a citizen or a permanent resident. The end **G** result would be that foreigners would be indirectly practising as consulting engineers through the back door way. Until changes are made to the law with respect to engineers in the light of globalization and the opening up of our market to foreigners, it remains a prohibition. **H**

[31] The attitude of the court has been that anything that smacks or smells of illegality or any set of facts that seems to support such a suggestion will surely be seriously scrutinised by it. No court would knowingly be a party to the enforcement of an unlawful **I** agreement. Support for this can be found in the case of *Thong Foo Ching & Ors v. Shigenori Ono* where Siti Norma Yaakob JCA [1998] 4 CLJ 674 (as she then was) held:

A As the arrangement between the parties is illegal and the illegality is not only with regard to its performance but in its very inception, such arrangement is void *ab initio* and the parties were outside the pale of the law. The respondent, being a party thereto, cannot claim any remedy under this arrangement. Even if the respondent had no knowledge of the illegality, the arrangement being intrinsically and inevitably illegal, the law gives him no allowance for innocence so far as consequences are concerned. The appellants, however, are entitled to rely upon illegality in their defence in order to meet the respondent's claim. The reason why the law allows the appellants to do so is due to the general principle of public policy contained in the *maxim ex do lo malo non aritur* action.

[32] In *Kondapuram Raghuram v. Soo Peng & Ors* [2006] 7 MLJ 510, Ramly Ali J (as he then was) had occasion to address a similar issue in the context of an 'Ali-Baba' arrangement' *vis-à-vis* the application of s. 24(e) Contracts Act 1950:

> The respondents are alleging that the petition is tainted with illegality and against the public policy in the sense that the petitioner in parking his shares in the company with the 2nd respondent (as alleged by him in the petition) was trying to deceive the licensing board, namely the Pusat Khidmat Kontraktor and ultimately the government into according the company an untrue "bumiputra status" company, thus enabling the company opportunity to secure special contracts. This, the respondents claimed, was designed to circumvent the New Economic Policy where bumiputra participation in businesses is in line with.
>
> In other words, assuming what the petitioner alleged is true, the parking of the shares by the petitioner with the 2nd respondent is merely designed to obtain the bumiputra status of the company so as to enable the company to secure special status as a "bumiputra" company. Parties do not deny that a "bumiputra" status company has certain privileges in securing contracts for works from the government and quasi-government institutions. These privileges are restricted for true "bumiputra" status companies only.
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> What the petitioner seeks from this court in his petition is *inter alia*, for the court's sanction and the giving effect of his purported scheme elaborately designed to deceive the licensing board, namely the Pusat Khidmat Kontraktor and ultimately the government and the quasi-government bodies into according the company an untrue "bumiputra" status company, thus enabling the company opportunity to secure the special contracts. The petitioner's act is designed to circumvent the New Economic Policy where bumiputra

participation in businesses is in line with. This tantamount (sic) to an improper act and certainly is one which is contrary to public policy. Section 24(e) of the Contracts Act 1950 states very clearly that "the consideration or object of an agreement is lawful unless ... (e) the court regards it as immoral or opposed to public policy".

Hence, every agreement of which the object or consideration is unlawful is void. Hence, the petitioner's claims are unenforceable and this court should not be used to facilitate the petitioner's claims any further.

The petitioner's purported scheme of parking his shares with the 2nd respondent has the effect of avoiding the New Economic Policy at the very outset. This scheme controversies *(sic)* the purpose and intention of the New Economic Policy. Hence, so long as the scheme concerned has the effect of defeating statutes or laws and policies of Malaysia, the scheme and any agreements thereunder would be illegal and unenforceable. It is trite that no court will lend its aid to a man who found his cause of action upon an illegal act (intended or otherwise). Such a cause of action cannot be maintained and no claim or recovery pursuant thereto would be allowed. This ground alone will justify the petition be struck out by the court *in limine*. The court finds some authorities to support this conclusion.

[33] It is revealing to note that the plaintiff in para. 6 of its statement of claim states that the local shareholders are holding shares as proxies for the plaintiff. One can have no clearer admission that the plaintiff's true intention was to create an 'Ali Baba' type of company where the control of the company is still vested in the hands of the foreigners.

[34] It goes without saying that in Malaysia, a Bumiputra status company enjoys certain privileges when it comes to procuring government related projects. This is a national economic policy of which this court can take judicial notice. See the case of *David Hey v. New Kok Ann Realty Sdn Bhd* [1984] 1 LNS 51. Other cases that show that the establishment of this 'Ali Baba' type of company is illegal as it is against the public policy of Malaysia can be gleaned from the following: *Bakar Ahmad v. Subramaniam Kanniah* [1992] 4 CLJ 1833; [1992] 2 CLJ (Rep) 154, *Tan Bing Hock v. Abu Samah* [1967] 1 LNS 176, *Baldev Singh v. Mahima Singh & Ors* [1974] 1 LNS 13.

[35] I agree with the defendant's argument that had this proxy shares arrangement been made known to the Board of Engineers at the material time, the plaintiff would not have been able to obtain the requisite approval from the Board of Engineers to establish a consulting engineering company in Malaysia. A case across the causeway that is illustrative of this principle of striking down a contract that has the nefarious intention of deceiving the public administration is that of *Suntoso Jacob v. Kong Miao Ming & Anor* [1984] 1 LNS 32 and closer home the Court of Appeal case of *Fusing Construction Sdn Bhd v. Eon Finance Bhd & Ors and Another Appeal* [2000] 3 CLJ 341. The plaintiff made a gallant argument that the enforcement of the two Call Option Agreements between the plaintiff and the defendant is nothing more than an ordinary commercial matter devoid of and divorced from any taint or trace of illegality. It was argued for the plaintiff that the words 'held in trust' were not used throughout the statement of claim and that the plaintiffs claim is for specific performance in the transfer of the said shares from the defendant to the plaintiff. In other words it is a pure commercial remedy. However the presence of the words in para. 6 of the plaintiff's statement of claim, 'Proxy Shares owned by the plaintiff' and in para. 21i. 'A declaratory order that the plaintiff is the beneficial owners of the 60,000 shares and the 5,000 shares …' are all redolent of the trust relationship between the parties in contravention of s. 10(4) Registration of Engineers Act 1967.

[36] I would have far less problem in agreeing with this argument if the shares concerned were not that of shares in a body corporate governed by statute where all the shareholders shall consist of either Malaysian citizens or permanent residents of Malaysia who are registered engineers. I might then have to consider that issue *vis-a-vis* the non-recognition of trust with respect to shareholding in the company. Indeed the plaintiff claims *inter alia* for a declaratory order that the plaintiff is the beneficial owner of the 65,000 NDYSB's shares registered in the name of the defendant. However, the plaintiff in its own website had represented that NDYSB is an independently operated, managed and owned by local shareholders and is not related to the NDY Group. The plaintiff further stated in its own website that NDYSB is not associated or involved with the NDY Group and accept no liability for any loss or damages incurred as a result of any act or omission of NDYSB.

[37] The plaintiff cannot be someone else to the world and a different person to the shareholders of NDYSB. In other words the plaintiff cannot have multiple personalities! The plaintiff cannot blow hot and cold. While some of us may have to go through life trying to find the answer to the illusive question 'Who am I?', by and large in the commercial world and expressed in pure commercial terms we know where we stand in a legal relationship to another entity. In *Kang Kok Kwang v. Bukit Baru Centre Sdn Bhd & Ors* [1991] 1 CLJ 343; [1991] 2 CLJ (Rep) 789, a claim based on a plea of trust was struck out as not disclosing a reasonable cause of action:

> … any share upon trust, and the company shall not be bound by or be required in any way to recognize (even having notice thereof) any equitable, contingent, future or partial interest in any share or any other rights in respect of any share other than an absolute right to the entirety thereof in the registered holder except only as by the articles otherwise provided for or as by Act required or pursuant to any order of court or except as provided in Section 163(4) Companies Act 1965.

[38] Clause 9 of the Articles of Association of NDYSB contains a similar stipulation.

[39] Where agreements are conceived and carried out in the context of circumventing, contradicting and contravening the law, one must concede that it is impossible to separate the stream from the source. If the source is contaminated the stream will be as well. Indeed the stream will be inextricably, invariably and inevitably be contaminated. If the root is bad the tree and fruit will be as well. The whole tree would have to be struck down. To use another analogy: A little leaven leaveneth the whole lump!

[40] I agree with the defendant's submission that whilst the case of *Kondapuram* is based on a public policy contravention caught under s. 24(e) Contracts Act 1950, that of the defendant is buttressed on a firmer footing-that of a breach of a statute and as such caught under s. 24(a) and (b) of the Contracts Act 1950.

[41] Would the presence of a severability clause in the agreement help the plaintiff? I do not think so. To allow the severability clause to save the agreements would be scandalous! The plaintiff would have the best of both worlds in that if the agreements were bad in law, they would still be able to enforce the agreements. This

device of detaching the unlawful and illegal from that which is not appears under the Contracts Act 1950 to have been totally disabled by virtue of s. 25 thereof which reads:

> If any part of a single consideration for one or more objects, or any one or any part of any one of several considerations for a single object, is unlawful, the agreement is void.

[42] Would any purpose be served by going to trial where more evidence will be adduced to support and perhaps even strengthen the plaintiff's claim? I think not for at every corner the plaintiff will be confronted with the charge of illegality.

Pronouncement

[43] Based on all the aforesaid, I am constrained to hold that the plaintiff's claims cannot be sustained and I hereby allow the defendant's application to strike out the plaintiff's claim more particularly under O. 18 r. 19(1)(a), (b) and (d).

[44] Normally cost would follow the event. However in this case the defendant is himself a willing party to the illegal transactions and so should not be allowed to profit from any cost that might normally be granted in its favour. Hence no cost is to be awarded to the defendant.

Postscript

[45] I gather that in real life such an arrangement of parking shares in the names of proxies and having a Call Option Agreement coupled with an irrevocable Power of Attorney and perhaps keeping custody of the shares certificates and even having blank transfer forms of the shares duly signed together with undated letters of resignation are all elaborately employed to meander clear of any infraction of the law. I can only say that those who are so engaged in such an elaborate exercise do so at the risk of their whole investment becoming totally irrecoverable when the matter should come to the court. No foul hands shall touch the pure fountain of justice and so the court would not allow its facilities to be used to unravel the mess which was caused by and carried out by the parties in clear contravention of the law. Let the estate lie where it falls!